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Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	**CC Docket No. 01-338**

JOINT EMERGENCY PETITION FOR STAY PENDING JUDICIAL REVIEW

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CompTel/ASCENT, KMC Telecom Holdings, Inc. ("KMC"), XO Communications, Inc. ("XO"), SNiP LiNK, LLC and Xspedius Communications, LLC ("Xspedius") (collectively, "Petitioners"), by and through counsel, hereby petition the Federal Communications Commission ("Commission" or "FCC") for an emergency stay, pending judicial review, of its recent *All-or-Nothing Order* issued July 13, 2004 in the above-captioned docket.[1] The *All-or-Nothing Order*, which becomes effective August 23, 2004, abrogates the rights of competitive carriers under Section 252(i) of the 1996 Act,[2] 47 U.S.C. § 252(i), and will cause serious, immediate and irreparable harm to the Petitioners and other competitive carriers. In so doing, the *All-or-Nothing Order* will substantially undermine the development of local telecommunications competition in the United States. This Order, which contravenes the plain language and the clear intent of Congress, will severely impede, if not preclude, the continued provisioning of innovative, competitively priced services to consumers, and moreover will create

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[1] *Implementation of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, FCC 04-164 (rel. July 13, 2004) ("*All-or-Nothing Order*" or "*Order*"). This order was published in the Federal Register at 69 Fed. Reg. 43762 on July 22, 2004. *See also FCC Adopts All-or-Nothing Rule to Replace Pick-and-Choose Rule*, Press Release, CC Docket No. 01-338 (July 8, 2004).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.* (West 2001).

a fundamental shift in the manner in which all competitive carriers are able to plan and operate their businesses. Entry of a stay therefore will serve the public interest, as well as the telecommunications industry, by maintaining the *status quo* in the rules governing interconnection negotiations until a full judicial review of the *All-or-Nothing Order* can be obtained.

BACKGROUND AND SUMMARY

Section 252(i) of the 1996 Act grants all competitive local exchange carriers ("CLECs") the right to choose discrete portions of an interconnection agreement ("ICA") that has been approved by a State Commission and adopt them as their own. It states, in pertinent part, that

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. § 252(i).

Pursuant to this mandate, and within the same year that the 1996 Act was enacted, the FCC adopted Rule 51.809, 47 C.F.R. § 51.809, which, nearly mirroring the statutory language, stated that

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

47 C.F.R. § 51.809(a). This rule reflects the FCC's contemporaneous understanding of the meaning and intent of Section 252(i). Although the Eighth Circuit vacated this rule in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 801 (8th Cir. 1997), it was reinstated by the U.S. Supreme

Court in 1999 and has been in place ever since. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

The *All-or-Nothing Order* all but eradicates that right by, according to the FCC's own words, "eliminat[ing] the pick-and-choose rule and replac[ing] it with the all-or-nothing rule." *Order* ¶ 24. This new rule "requires a requesting carrier seeking to avail itself of terms in an interconnection agreement to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement." *Order* ¶ 1. By its terms, the Order will become effective on August 23, 2004, and will apply immediately to all existing ICAs and all pending or future negotiations. *Order* ¶ 10.

ARGUMENT

On a motion to stay administrative orders pending judicial review, courts consider "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably injured absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Iowa Utils. Bd. v. FCC*, 109 F.3d 420, 423 (8th Cir. 1996) ("*Iowa Utils. Stay Order*") (imposing stay of the *First Local Competition Order*[3] pending judicial review in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997)).[4] All of these factors strongly support grant of this petition.

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, First Report and Order, 11 FCC Rcd. 15499 1996).

[4] Courts have emphasized that these factors are to be addressed on a "sliding scale," so that when "the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas" are less compelling. *E.g.*, *Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998). This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending judicial review. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) ("An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.... [Such relief is available] whether or not movant has shown a mathematical probability of success.").

I. PETITIONERS WILL BE IRREPARABLY HARMED IF THE *ALL-OR-NOTHING ORDER* BECOMES EFFECTIVE

The *All-or-Nothing Order* will create havoc in the local telecommunications industry by turning on their head the rules that govern ICA negotiations. This in turn will force CLECs, including the Petitioners, to forego significant revenue streams while they revamp their strategy for entry and service provisioning. The rates that they now pay, the elements they obtain, and the business rules governing their relationships with ILECs are jeopardized by the elimination of pick-and-choose, in that these CLECs must begin from scratch to re-negotiate in the entirety a number of expired or expiring contracts without reliance on what was a very efficient and fast process. Affidavit of James C. Falvey ¶¶ 10-11 (Aug. 2, 2004) ("Falvey Aff."). These re-negotiations will now require CLECs to expend, by orders of magnitude, significantly more time and money than under pick-and-choose. In addition, they will endanger critical sources of revenue for Xspedius and other CLECs that cannot be billed unless a valid ICA is in place. Falvey Aff. ¶ 6. In sum, full-scale ICA negotiations will cause carriers, such as petitioner Xspedius, severe financial harm while undermining the current business model pursued by many CLECs. *Id.*

The risk of irreparable injury is particularly acute at this time because the D.C. Circuit's *vacatur* of the *Triennial Review Order* in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), has necessitated substantial re-negotiation of numerous ICAs in nearly every ILEC region. Thus, not only have the laws and regulations governing mandatory ILEC unbundling been fundamentally changed, but so have the rules by which new ICAs will be negotiated and executed. These virtually simultaneous policy changes will create massive confusion in the industry and create a near-total vacuum of regulation. Such "regulatory vacuums" are to be avoided and counsel in favor of leaving existing rules intact, if only

temporarily. *Small Refiner Lead Phase-Down Task Force v. U.S. E.P.A.*, 705 F.2d 506, 545 (D.C. Cir. 1983) (delaying *vacatur* of interim gasoline lead content rules to enable remand of prior rules on emergency basis). *See also USTA II*, 359 F.3d at 595 (delaying entry of mandate of *vacatur* until the later of 60 days or the denial of a petition for rehearing); *Service Employees Intern. Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1359 (9th Cir. 1994) (Department of Labor was arbitrary and capricious in not updating salary rules under Fair Labor Standards Act); *Stern v. General Elec. Co.*, 924 F.2d 472, 475 n.4 (2d Cir. 1991) (preemption of state election law inappropriate if "regulatory vacuum" would result).

As to the new all-or-nothing rule in particular, were it to become effective, every CLEC in the nation would have to re-negotiate, from scratch, entire sections of their expiring ICAs without the ability to rely on the ICA provisions that other carriers have already painstakingly negotiated with the ILECs. Such negotiations, as several commenters in this proceeding have explained, almost invariably lead to full-blown arbitration under Section 252, which is time-consuming and extremely expensive — essentially, the equivalent of full-blown litigation. Falvey Aff. ¶ 7.[5] Arbitration delays entry and saps increasingly scarce CLEC resources,[6] and in the case of Xspedius has cost as much as $500,000 per case. Falvey Aff. ¶ 7. This drain is exacerbated by the delay, or possible inability, of CLECs' to obtain "critical

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[5] *See also* Comments of CLEC Coalition at 5 (Oct. 16, 2003) (This coalition comprised Excel Telecommunications Inc., KMC, XO, NuVox Inc., SNiP LiNK, LLC, Talk America, Vartec Telecom, Inc., and Xspedius); Comments of the Promoting Active Competition Everywhere ("PACE") Coalition and CompTel at 809 (Oct.16, 2003) (The PACE coalition included ACCESS Integrated Networks, Inc., ATX Communications, Inc., Birch Telecom, BizOnline.com, Inc. d/b/a Veranet Solutions, BridgeCom International, DataNet Systems, DSCI Corp., Ernest Communications, IDA Telcom LLC, InfoHighway Communications, ITC^DeltaCom Communications, Inc., Granite Telecommunications, MCG Capital Corporation, MetTel, Microtec-Tel, Momentum Business Solutions Inc., nii communications, and Z-Tel Communications, Inc.); ALTS Comments at 7 (Oct. 16, 2003); LecStar Comments at 5 (Oct. 16, 2003).

[6] The Commission notes that arbitration remains available to CLECs that choose to negotiate an entire agreement from scratch, *Order* ¶ 20, ignoring considerable record evidence regarding the cost and delay inherent in that process. *See supra* note 5.

revenue streams" — intercarrier compensation — that cannot be collected prior to execution of an ICA. Falvey Aff. ¶¶ 6-7. With pick-and-choose, these losses are avoided, and indeed many CLECs made clear that they have relied on pick-and-choose for precisely this purpose.[7] Were pick-and-choose to be reinstated, which is likely upon the reversal of the Commission's *All-or-Nothing Order* (*see* Section II, *infra*), these arbitration costs would in large part have been unnecessary. Yet these costs would be impossible to recoup, and the delay unrecoverable, which constitutes irreparable injury of the type that stays are intended to prevent.[8]

This harm will occur immediately, in the next few months, such that the market cannot wait for the outcome of an appeal, even an expedited one. With the D.C. Circuit's entry of the *USTA II* mandate, ICAs must be re-negotiated *now*. Absent resort to pick-and-choose, CLECs will surely be in arbitration — incurring a significant expense — by the end of the year. *See* Falvey Aff. ¶ 8.[9]

Further, this harm will not be rectified if the rule is merely reinstated after appeal. If the *All-or-Nothing Order* is permitted to become effective, all of the ICAs presently in negotiations could not be crafted by opting in to less than an entire agreement. There can be no doubt that many portions of these all-or-nothing ICAs would have been different under a pick-and-choose regime. Yet it is questionable whether CLECs would be able to erase the harm caused by the all-or-nothing rule once the pick-and-choose rule is re-established after judicial

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[7] The record demonstrated that many CLECs rely on pick-and-choose to enter markets and serve customers. CLEC Coalition Comments at 10; PACE/CompTel Comments at 3; Comments of MPower Communications Corp. at 7-8 (Oct. 16, 2003); ALTS Comments at 6; LecStar Comments at 3; Z-Tel Comments at 6. *See also* Falvey Aff. ¶ 5 (14 of 21 Xspedius states operate under ICAs crafted via pick-and-choose), ¶ 6 (pick-and-choose was crucial for Xspedius in implementing its acquisition of e.spire's assets in 2002).

[8] *See Holiday Tours, Inc.*, 559 F.2d at 843 n.2 (noting that the essential destruction of a business is an essential economic injury and not a "mere" economic injury that is insufficient to warrant a stay). *See also Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929 (D.C. Cir. 1976).

[9] *See also* CLEC Coalition Reply Comments at 5 (Nov. 11, 2003).

review. It is problematic that any CLEC could show what provisions it would have been able to include in the ICA had the all-or-nothing rule never existed, and even if it could, in many cases such ICA modifications would not take effect retroactive to the effective date of the all-or-nothing rule. *See* Falvey Aff. ¶ 11. Absent a stay, it is likely that CLECs will be forced to endure a period of months and perhaps even years of being forced to accept the inferior ICAs entailed by the FCC's new all-or-nothing rule, thereby irreparably depriving them of the rights, terms, and conditions that Section 252(i) was written to afford them. Accordingly, a stay of the *All-or-Nothing Order* should be entered at this time, in order to preserve the *status quo* and avoid severe competitive harm that likely will be proven unwarranted.

II. PETITIONERS ARE LIKELY TO PREVAIL IN THEIR APPEAL OF THE *ALL-OR-NOTHING ORDER*

The *All-or-Nothing Order* is likely to be reversed on several grounds. The Order contravenes Congress's plain language and clear intent in Section 252(i), resting on a particularly tortured scheme of statutory interpretation not likely to be affirmed by any Court of Appeals. Moreover, it rests on agency assumptions rendered implausible by a significant portion of the record. Finally, the *All-or-Nothing Order* in effect constitutes a decision to forbear from enforcing Section 252(i) without having engaged in the requisite public interest analysis required by Section 10, 47 U.S.C. § 160. Given these disabling infirmities, the Order is likely to be vacated or reversed, thus warranting entry of a stay. *Iowa Utils. Stay Order*, 109 F.3d at 423.[10]

[10] "In evaluating the likelihood of the petitioners' success on appeal, we note that the petitioners 'need not establish an absolute certainty of success.'" *Id.* (quoting *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986)).

A. The Order Impermissibly Ignores the Language of Section 252(i)

In abolishing pick-and-choose, the Commission has ignored the operative terms of Section 252(i), and thus has exceeded its statutory authority and promulgated a rule that is, as a matter of law, arbitrary and capricious. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (agency had no authority to create retroactive rule without express statutory authorization); *WorldCom v. FCC*, 246 F.3d 690 (D.C. Cir. 2001) (vacating decision that Digital Subscriber Line services fall under exclusive FCC jurisdiction as "interstate access service"); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (agency had no statutory authority to mandate collocation). In stripping CLECs of the right to adopt "any interconnection, service, or network element arrangement in any agreement," and instead forcing them to adopt an agreement "in its entirety" (*Order* ¶ 1), the Commission has so eviscerated Section 252(i) that its action cannot withstand scrutiny.

Courts must presume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). *See also Sundance Assoc., Inc. v. Reno*, 139 F.3d 804, 809 (10th Cir. 1998) ("we assume that in drafting legislation, Congress says what it means.") (striking down regulation implementing Child Protection and Obscenity Enforcement ("CPOE") Act). Federal agencies have no authority to revise by regulation the language chosen and enacted by Congress. *See Sundance*, 139 F.3d at 810 ("neither the court nor the Attorney General has the authority to rewrite a poor piece of legislation (if, indeed, that is what it is)"). Certainly an agency may not by regulation remove or render ineffectual whole clauses of a statute, as that practice, according to the *Sundance* Court, "leads us down a path toward Alice's Wonderland, where up is down and down is up and words mean anything." 139 F.3d at 809.

Even where a statute may reasonably be deemed vague or ambiguous, agencies have no deference to "go[] beyond the meaning that a statute can bear." *MCI Telecomm. Corp. v. FCC*, 512 U.S. 218, 229 (1994) (affirming reversal of FCC permissive detariffing rule). Although agencies are permitted to resolve, through their expertise, facially ambiguous mandates or statutory "gaps," *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), they may not do so in a manner that nullifies Congress's words or renders an absurd result. *E.g., Prometheus Radio Project v. FCC*, 2004 WL 1405975 (3d Cir. June 24, 2004) (reversing FCC relaxation of media ownership rules). In doing so, an agency will have outreached its authority and impermissibly encroached upon the legislative power of Congress.

The Commission has committed this error in the *All-or-Nothing Order*. Where Section 252(i) states that CLECs may obtain "***any*** interconnection, service, or element" term contained in an ICA, the FCC now declares that CLECs must take ***all*** "interconnection, service, or element" terms of an ICA, or none at all. *Order* ¶¶ 1, 24. Where Congress chose a word that means "one or some,"[11] the Commission has substituted a rule requiring "all or none." This decision cannot be squared with the language of Section 252(i) under any reasonable interpretation.

Nor can the all-or-nothing rule be squared with the "under an agreement" clause of the statute. Congress mandated in Section 252(i) that ***any*** element or service ***under an agreement*** must be made available to CLECs. On its face, this language means that a CLEC has the ability to select discrete services or elements from each of the ICAs that an ILEC has negotiated with other carriers. Suppose, for example, that a CLEC desires to obtain the UNE

[11] "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)).

provisions in one ICA, while selecting the collocation provisions in another ICA. The UNE provisions in the first ICA qualify as "any interconnection, service, or network element provided under an agreement," and the collocation provisions in the second ICA qualify as "any interconnection, service, or network element provided under an agreement." Hence, as written, Section 251(i) requires that a CLEC be permitted to select the UNE provisions from the first agreement and the collocation provisions from the second agreement. The FCC's new all-or-nothing rule impermissibly narrows the scope of the CLECs' statutory right by requiring them to select all interconnection, services and network elements under a single ICA. Or, possibly, the Commission has determined that "under an agreement" is "mere surplusage"[12] that it need not follow, and simply read this clause out of Section 252(i). In either case, the Commission has adopted a rule that ignores or directly contravenes Congress's language. *Sundance*, 139 F.3d at 809-810 (Attorney General impermissibly read "does not include" out of CPOE Act).

In effect, the Commission has re-written Section 252(i) to say that "a local exchange carrier shall make available any interconnection agreement approved under this section to which it is a party to any other requesting telecommunications carrier." Congress could have adopted this provision, but it did not. Congress deliberately wrote the provision to ensure that requesting carriers could obtain discrete portions of ICAs, hence the reference to "any interconnection, service, or network element." Congress deliberately wrote the provision to ensure that requesting carriers can select discrete portions of different ICAs, hence the reference to services or functions "provided under an agreement." None of that was necessary if Congress intended to adopt, or permit the FCC to adopt, the all-or-nothing rule.

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[12] *Local Competition First Report and Order*, 11 FCC Rcd. at 16138 ¶ 1310. *See also Potter v. United States*, 15 S. Ct. 144, 147 (1894) (Congress's statutory language cannot be rendered "mere surplusage").

This conclusion holds true regardless of whether Section 252(i) is found to be ambiguous. The Commission is correct that the Supreme Court in *Iowa Utilities* did not state that the pick-and-choose rule, as then written, was "compelled by the statute." *Order* ¶ 8. It is also correct that the Supreme Court suggested that the Commission may, in its expertise, clarify or modify pick-and-choose in a manner that would enable CLECs to obtain "favorable interconnection, service, or network-element terms to be traded off against unrelated provisions." 525 U.S. at 396. But nothing in *Iowa Utilities* or in settled canons of administrative law or statutory interpretation permits the Commission to ignore the core mandate of Section 252(i) entirely. *Sundance*, 139 F.3d at 809-810. There is no discretion available for the FCC to so boldly rewrite a federal statute. *MCI*, 512 U.S. at 229.

B. The Order Rests on Implausible and Unsupported Agency Predictions About ICA Negotiations

The Commission is entitled to make predictive judgments about the behavior of markets and regulated entities insofar as those judgments are reasonable and based in the record. *E.g.*, *WorldCom v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001) (affirming 1999 *Price Flexibility Order*); *California v. FCC*, 39 F.3d 919, 916 (9th Cir. 1994) (affirming, in part, *Computer III* structural separation order). Although, as the *WorldCom* Court held, the FCC need not be "be confident to a metaphysical certainty of its predictions," 238 F.3d at 459, courts must nonetheless ensure that the Commission "'identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation.'" *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 822 (D.C. Cir. 1983) (reversing Secretary of Labor decision to rescind restrictions on textile homework) (quoting *Telocator Network of America v. FCC*, 691 F.2d 525, 544 (D.C.Cir.1982)).

These requirements are particularly crucial where, as here, an agency's decision marks a striking change in or reversal of previous policy. *Donovan*, 722 F.2d at 822. Indeed, the analytical rigor required to justify an agency's policy reversal demands that there be a well-articulated rationale for the change that is both based in the record and reasonable to the reviewing court. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Communications and Control, Inc. v. FCC*, 2004 WL 1635622 at *4 (D.C. Cir. July 23, 2004) (reversing denial of transmitter license); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (reversing new "eight voices" exception to cross-ownership restriction).

In the instant case, the Commission's judgments fail these analytical and evidentiary requirements. In order to justify abolishing pick-and-choose, the Commission clings to several dubious premises. Among these premises are a belief that CLECs do not rely on pick-and-choose to craft ICAs, *see Order* ¶ 21,[13] and that the undeniable bargaining power of incumbent monopolists in this market will be outweighed by increased "creativity in negotiation." *Id.* ¶ 14. The Commission also presumed, contrary to both record evidence and logic, that CLECs' concern about "poison pills," or ICA terms that effectively limit another carrier's ability to achieve the same benefits from an ICA as the carrier that first negotiated it, was unfounded. *Id.* ¶¶ 21-22. None of these premises are legitimately found in the record, nor are they an appropriate conclusion from an agency that has witnessed, through years of contentious rulemakings and complaint adjudication, the extreme disadvantages encountered by new entrants in the local telecommunications market. They are counter-factual, counter-

[13] The Commission states that its previous prediction in the *Local Competition First Report and Order* that "new entrants would likely be unwilling to adopt agreements in their entirety" did not prove true, and relies upon ILEC representations that pick-and-choose ICAs "are the exception rather than the rule" (*Order* n. 78 (quoting Comments of PaeTec at 2)), resulting *a fortiori* in the conclusion that CLECs have not relied upon pick-and-choose.

intuitive, and simply false as a matter of industry experience. Dozens of carriers made this clear to the Commission in their comments.[14]

The Commission's first premise — that CLECs do not use pick-and-choose — is nonsensical in that it belies the very purpose of the *All-or-Nothing Order* itself. If pick-and-choose were not widely used, then the FCC's purported motivation for the order is immediately void, as there would be no "impediment" to negotiation (*Order* ¶ 12) nor any "cherry-picking" to take unfair advantage of the ILECs.[15] It is precisely because CLECs use pick-and-choose that the ILECs fought so hard to have it abolished. Thus, the FCC's core basis for predicting that abolishing pick-and-choose will "benefit competitive LECs" by helping them create "individually tailored provisions more efficiently" (*Order* ¶ 15) is illusory. Accordingly, the Commission's predictions of a new, procompetitive negotiating environment under the all-or-nothing approach are unreasonable and unsupported. *E.g.*, *Donovan*, 722 F.2d at 822.

Predictions about "creativity" in negotiations with ILECs are simply contrary to record evidence. Numerous CLECs explained to the Commission that ILECs retain enormous bargaining power, and have proven absolutely intransigent in negotiating ICA terms.[16] Moreoever, ILECs have both the incentive and the luxury of drawing out negotiations, thus delaying a CLEC's entry and driving up costs. The ILECs have shown no proclivity whatever to "creativity," insofar as that would result in advantageous ICA terms, and the Commission has no basis to believe otherwise.

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[14] CLEC Coalition Comments at 9-13; PACE Comments at 5; ALTS Comments at 6; MPower Comments at 6; US LEC Comments at 4; ZTel Comments at 3, 6.

[15] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 16978, 17412 ¶ 719 (2003).

[16] CLEC Coalition Comments at 9-11; PACE Comments at 5-7; Mpower Comments at 6; Sprint Comments at 4; Z-Tel Comments at 6; ALTS Comment at 14; LecStar Comments at 2-3; MCI Comments at 9-11.

Finally, "poison pills" are a real and legitimate concern for CLECs in an all-or-nothing environment. As expressed by several parties, if carriers are required to take ICAs in their entirety, such that harmful — not merely superfluous — terms are unavoidable, poison pills will become rampant.[17] The Commission's reply to these concerns is that present ICAs do not contain poison pills, and thus it predicts that poison pills will not occur in the future. *Order* ¶ 21. This finding ignores the obvious explanation for the absence of poison pills in ICAs today. They do not exist because pick-and-choose enabled CLECs to avoid them. Because poison pills cannot be effective in a pick-and-choose environment, the ILECs had no incentive to negotiate them. With the abolition of pick-and-choose, the ILECs now have a strong incentive to include poison pills in their ICAs, and there is no logical or empirical basis for assuming that the ILECs will not act in response to such incentives. The Commission's prediction on this point is therefore unfounded, leaving the *All-or-Nothing Order* without sufficient analytical foundation to survive judicial challenge. *State Farm*, 463 U.S. at 43; *Donovan*, 722 F.2d at 822.

C. The Commission Failed to Adhere to the Requirements for Forbearance

The *All-or-Nothing Order* effectively constitutes a decision to forbear from enforcing Section 252(i) that neither acknowledges nor satisfies the statutory prerequisites for forbearance contained in Section 10 of the 1996 Act, 47 U.S.C. § 160. In effect, the Order represents a decision by the Commission to cease enforcing the core mandate of Section 252(i), because by its own terms it "eliminate[s] the pick-and-choose rule." *Order* ¶ 24. As such, the Commission has unlawfully circumvented Congress's test for forbearance and thus by definition exceeded its authority. *See Association of Commun. Enters. v. FCC*, 235 F.3d 662, 665 (D.C.

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[17] CLEC Coalition Comments at 7-8; MCI Comments at 13; US LEC Comments at 6; ALTS Comments at 14; Z-Tel Comments at 11-12.

Cir. 2001) ("*ASCENT*") (vacating advanced services provisions of SBC-Ameritech Merger Conditions as circumventing Section 10 analysis).

Section 10 of the 1996 Act requires the Commission to engage in an inquiry comprising three equal and conjunctive parts as to whether it should forbear from enforcing an existing rule: (1) the rule is no longer necessary to prevent unjust or unreasonable conduct; (2) the rule is no longer necessary to preserve consumer welfare; and (3) forbearance from enforcing the rule is in the public interest. 47 U.S.C. § 160(a). If the FCC finds that one of these factors cannot be satisfied, forbearance would be improper. *Cellular Telecomm. & Ind. Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (FCC did not err in denying petition to forbear from enforcing wireless number portability rule). More importantly for purposes of the instant case, the FCC may not abolish existing rules and safeguards without "explicitly invok[ing]" and satisfying the strictures of forbearance analysis. *ASCENT*, 235 F.3d at 666. Such action is "in direct violation of Section 10," *id.*, and it renders the *All-or-Nothing Order* an unreasonable agency action. *Id.* at 668.

That the Order essentially represents forbearance under Section 10 cannot reasonably be disputed. Section 252(i) states that CLECs may choose "any interconnection, service, or element" from an approved ICA, and the Order holds that this choice is no longer available. Where Commission Rule 51.809 previously required that "[a]n incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement," today that rule will no longer be enforced. This result, which the Commission derived without invoking, much less satisfying, Section 10, constitutes arbitrary and capricious rulemaking and is likely to be overturned.

III. THE RELATIVE IMPACT OF A STAY ON THE ILECs IS NEGLIGIBLE

Stay of an agency order is appropriate where the harm to non-movants is comparatively less grave. *Iowa Utils. Stay Order*, 109 F.3d at 423. A stay of the Order will simply preserve the *status quo*[18] in ICA negotiations pending judicial review, and it will have a comparatively small impact on the ILECs. Indeed, given the Commission's view that CLECs do not routinely use pick-and-choose (*Order* ¶ 21 & n.78), ILECs have little to fear if the rule remains in place. At most, a stay will permit CLECs to continue negotiating ICAs that are based in part on discrete portions of (rather than the entirety of) existing ICAs, which furthers the goal of efficient, vibrant negotiation on which the new Order is explicitly based. *See Order* ¶¶ 11, 14, 15. It moreover will minimize the need to arbitrate, which not only imposes significant costs on CLECs, *see* Section I, *infra*, but also taxes ILEC resources as well. Thus, imposing a stay pending appeal also benefits the ILECs. Under either result, consideration of ILEC interests does not undermine the granting of a stay.

IV. THE PUBLIC INTEREST WEIGHS STRONGLY IN FAVOR OF A STAY

Because of the overwhelmingly negative impact that the Order will impose on local telecommunications competition, and on the ability of CLECs to continue serving customers, the public interest would be well served by a stay. The elimination of pick-and-choose, which absent a stay occurs on August 23, will have grave consequences for CLECs across the country. This harm will be especially widespread in this post-*USTA II* period in which unbundling law is substantially in flux.

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[18] Preserving the *status quo* with a stay is favored where a significant question of agency authority is present. *See Holiday Tours*, 559 F.2d at 844. In such circumstances, the burden on petitioners of demonstrating "mathematical certainty" of prevailing on the merits is diminished. *Id.*

The unavoidable result of the all-or-nothing rule will be the endangering of competition, indeed of the competitive services that consumers already enjoy, in direct contravention of the public interest. Where such a result is demonstrably likely, a stay should be granted pending judicial appeal. *See Ohio ex rel. Calabrezze v. Nuclear Reg'y Comm'n*, 812 F.2d 288, 292 (6th Cir. 1987) (public safety concern outweighed economic harm to licensee if operating license were stayed pending appeal).

CONCLUSION

For all these reasons, the Commission should stay the effectiveness of the *All-or-Nothing Order* until a final, non-appealable decision is obtained on the merits of that order. Petitioners reserve the right to file a stay petition with the appropriate Court of Appeals if the Commission does not act promptly to grant the stay requested herein.

Respectfully submitted,

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August 3, 2004

Affidavit of James C. Falvey

Xspedius Communications, LLC

August 2, 2004

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of **Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers**	**CC Docket No. 01-338**

AFFIDAVIT OF JAMES C. FALVEY

I, James C. Falvey, pursuant to 28 U.S.C. Section 1746, do hereby declare, under penalty of perjury, that the following is true and correct.

1. I am employed by Xspedius Communications, LLC ("Xspedius") as Senior Vice President, Regulatory Affairs.

2. My business address is 7125 Columbia Gateway Dr., Ste. 200, Columbia, MD 21046.

3. Xspedius is a facilities-based telecommunications carrier that offers integrated voice, data and Internet services to small and medium-sized businesses. Xspedius currently has interconnection agreements with incumbent local exchange carriers ("ILECs") in 21 states. Xspedius is a privately held company headquartered in O'Fallon, Missouri.

Xspedius Communications owns and operates a network covering more than 3,500 route miles across the country.

4. The purpose of my affidavit is to explain the vital purpose that pick-and-choose serves for Xspedius, in support of the Joint Emergency Petition for Stay of the FCC's new "all-or-nothing" rule pending appeal.

PICK-AND-CHOOSE IS AN ESSENTIAL TOOL

5. Xspedius depends on the ability to adopt portions of existing agreements — to pick and choose — when entering into interconnection agreements with ILECs. Of the 21 states in which Xspedius operates, 14 of the interconnection agreements are the result of pick-and-choose.

6. In my experience, the ILECs have significantly more bargaining power than CLECs during interconnection agreement negotiations. Pick-and-choose is necessary, especially for smaller companies like Xspedius, to correct this power imbalance, which is why Congress made it an integral part of the Telecom Act and why Xspedius has used pick and choose extensively in its brief two-year existence. (Xspedius Communications was formed in the Summer of 2002 when the company bought the assets of e.spire Communications, Inc. out of Chapter 11 bankruptcy.) Absent this rule, Xspedius will not be able to keep its many interconnection agreements up to date in a manner that supports the Xspedius business plan. Xspedius will have to sacrifice critical revenue streams and will not be able to bill those revenues on a timely basis. The deferral, and in some cases elimination, of those revenue streams would have a significant adverse impact on the

Xspedius bottom line during a critical time in the growth of the company. In addition, Xspedius will have to devote personnel and expend financial resources that it can ill afford to spare on conducting full-blown negotiations and arbitrations in each of the 21 states where it provides service. The deferral of those revenue streams and the expenditure of these resources will result in serious, immediate, and irreparable harm to Xspedius.

XSPEDIUS HAS RELIED UPON ITS STATUTORY PICK-AND-CHOOSE RIGHTS EXTENSIVELY TO MAINTAIN THE INTEGRITY OF ITS MYRIAD INTERCONNECTION AGREEMENTS

7. Pick-and-choose has been critical to Xspedius over the last two years. When Xspedius purchased the assets of e.spire Communications, Inc., many of e.spire's interconnection agreements were expired and carrying on only because the ILEC had not formally terminated the agreements. In a period of 4 months, Xspedius refreshed its agreements in 14 states. Without pick and choose, Xspedius would have been forced to do one of two things. First, it could have negotiated and arbitrated new agreements. This can easily cost $200,000 to $500,000 and takes approximately 9 months – and sometimes much longer – to accomplish. Significant internal resources are also necessary to negotiate and arbitrate. Xspedius is not staffed to handle 14 arbitrations at once. While negotiations and arbitrations are pending, revenue is often not billable and/or collectible. This could put critical financial targets in jeopardy.

8. The second alternative if pick-and-choose were not available would be to do all-or-nothing opt-ins. But because each CLEC's business plan is different, all-or-nothing opt-

ins would also not support the billing of critical revenues by Xspedius. The revenues that Xspedius would not be able to obtain relate to cost-recovery for interconnection facilities and compensation for the use of CLEC switches by ILECs, revenues that Xspedius is entitled to under the Act and FCC rules. Like negotiation and arbitration, all-or-nothing opt-ins would cause Xspedius to lose revenue, which it cannot go back later and rebill.

9. As Xspedius interconnection agreements continuously expire, it continues to rely on pick-and-choose as a means of obtaining interconnection. These agreements, which the ILECs have already executed with other carriers, give Xspedius a chance to continue to operate across a broad region, coverage that is necessary to compete for regional and national customers against the larger ILECs and interexchange carriers such as AT&T and MCI.

XSPEDIUS HAS TEN INTERCONNECTION AGREEMENTS IN NEED OF RENEWAL IMMEDIATELY

10. At this time, several of Xspedius's agreements have expired or will expire in a matter of weeks: five separate interconnection agreements with Verizon; an agreement with Valor in Oklahoma; and the four agreements Xspedius has with SBC in Missouri, Oklahoma, Kansas and Arkansas (which themselves were formed through pick-and-choose). If Xspedius is unable to utilize pick-and-choose it will likely have to participate in lengthy and expensive arbitrations, as negotiations are highly unlikely to result in a workable agreement. In the alternative, Xspedius could pursue all-or-nothing opt-ins but, as discussed above, this would result in significant lost revenues that could not be later recouped.

11. Even if it were determined after-the-fact that Xspedius did in fact have a federal right to pick-and-choose opt-ins in these instances, it would be impossible to go back, put in place ten different agreements, and recalculate what all the proper results would have been under those ten different agreements. CLECs and ILECs refer to their agreements at least five times per week, so putting back together how different agreements would have been referenced during the relevant time period would also be impossible.

12. This is a classic case of irreparable harm. If CLECs are deprived of their federal pick-and-choose right for the period during which an appeal is pending, it will clearly result in irretrievably lost revenues, which are critical to the Xspedius business model. Given that CLECs have a federal right to pick-and-choose clearly written in to the plain language of the statute in order to guarantee CLECs access to unbundling, interconnection and resale on equal terms to larger, more established carriers, it is critical that CLECs be protected during the pendency of an appeal.

This concludes my affidavit.

Executed this 2d day of August, 2004.

James C. Falvey
Xspedius Communications, LLC

SUBSCRIBED AND SWORN TO BEFORE ME this 2nd day of August, 2004.

NOTARY PUBLIC

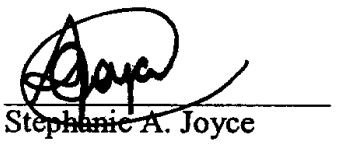
My Commission Expires:

12-1-04

CHERYL L. RADCLIFFE
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires Dec. 1, 2004

CERTIFICATE OF SERVICE

I, Stephanie A. Joyce, hereby certify that on this 3rd day of August 2004, the foregoing Joint Emergency Petition for Stay Pending Judicial Review was served upon the following parties via electronic* and First Class Mail:



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